(2)

No. 89-1819

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

MONICA McCABE,

Petitioner,

v.

EUGENE A. PELIZZONI, EDWARD F. LEWIS, BOARD OF COUNTY COMMISSIONERS, TULSA COUNTY, OKLAHOMA, and JOHN F. CANTRELL, COUNTY TREASURER OF TULSA COUNTY, STATE OF OKLAHOMA,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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June, 1990

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QUESTIONS PRESENTED

1. Whether this Court has jurisdiction to review by Writ of Certiorari questions which were not properly presented below, and therefore, were not addressed by the Oklahoma Court of Appeals.

2. Whether this court should grant certiorari to review a question of state law that does not involve a substantial federal question.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

OPINIONS BELOW 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT 11

REASONS FOR DENYING WRIT 12

I.

This court lacks jurisdiction because the court below decided the issues correctly on independent state grounds. Further, this court should refuse to grant certiorari to review a question of state law that does not involve a substantial federal question. 12

II.

This court lacks jurisdiction to review on certiorari federal questions not properly presented or decided below. 14

III.

This case presents no question important enough to justify granting certiorari. 1

CONCLUSION 1

TABLE OF AUTHORITIES

Page

CASES:

Equitable Life Assurance Society v. Brown, 187 U.S. 308, 23 S.Ct. 123, 47 L.Ed. 190 (1902) 15

Herb v. Pitcarin, 324 U.S. 117, 65 S.Ct. 459, 89 L.Ed. 789 (1945) 13

New York Times v. Jascalevich, 439 U.S. 1317, 99 S.Ct. 6, 58 L.Ed.2d 25 (1978) 13

Pearce v. Board of County Commissioners, et al, Case #C-78-2116 9

OTHER AUTHORITIES:

28 U.S.C. §1257(a) 14

United States Supreme Court Rule 10 16

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI

The Respondents, Board of County Commissioners of Tulsa County, and John F. Cantrell, County Treasurer, by and through David Moss, District Attorney of Tulsa County, respectfully request that this Court deny issuance of a Writ of Certiorari to review the Opinion of the Court of Appeals

for the State of Oklahoma, Division No. III, entered on February 28, 1989.

OPINIONS BELOW

The memorandum opinion of the Court of Appeals for the State of Oklahoma, Division III, is fully set forth in the appendix of the Petition for Certiorari (pp. 1a-7a), and therefore is not reprinted herein. Respondents would, however, advise this Court of the following typographical errors in that opinion as set forth by Petitioner:

1. The legal description in paragraph 1 on page 2a of Petitioner's Appendix should read as follows: "N/2 NE/4 SE/4 § 19-T21N-R13E I.M.";

2. The second line on page 4a of Petitioner's Appendix should read: "ment, the Trial Court ruled that the 1978 quiet-title judgment"; and

3. The fourth line on page 7a of Petitioner's Appendix should read: "309 P.2d 731 (Okla. 1957); accord, *Chamberlin v. Davis*, 191."

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

There are no constitutional issues involved, and Petitioner did not present any constitutional issues to the courts below.

Petitioner has not challenged any specific Oklahoma statutes as being repugnant to the United States Constitution. Petitioner is simply unhappy with a state court decision based solely upon the application of state law.

STATEMENT OF THE CASE

In 1962, a 15-acre tract of land was sold, to satisfy past due ad valorem taxes, by the Tulsa County Treasurer and title was taken in the name of the county. In 1963, before expiration of the redemption period, Pearce obtained a tax certificate covering the fifteen acres. In 1965, Pearce applied for a Certificate Tax Deed, which was issued in 1967. On September 29, 1978, in the District Court in and for Tulsa County, Charles Pearce, filed an action to quiet

his title, in fee simple, to the following described tract of real property, to-wit:

> All of the North Half (N/2) of the Northeast Quarter (NE/4) of the Southeast Quarter (SE/4) of Section Nineteen (19), Township Twenty-One (21) North, Range Thirteen (13) East, lying North of Bird Creek, and described by metes and bounds as follows: Beginning at a stake, the Northeast corner of the said N/2 of NE/4 of SE/4 of Section 19; thence West 1320 feet to the Northwest corner of the said N/2 of NE/4 of SE/4 Section 19; thence South 70 feet to the center of Bird Creek; thence in a Southeasterly direction following the center of the channel of said Bird Creek to a point 30 feet North of the Southeast corner of the said N/2 of NE/4 of SE/4 of Section 10; thence North 630 feet to place of beginning, Tulsa County, State of Oklahoma.

One of the named Defendants in that action was Monica L. Sharum. Monica L. Sharum was Petitioner's predecessor in interest through which Petitioner McCabe claims an undivided ¼ interest in and to the minerals underlying a 20 acre tract of land of which the above described property is a smaller part. Pearce claimed title, in fee simple, to each and every part of the above described land by legal title (a Certificate Tax Deed) and by adverse possession. Pearce's Petition stated that:

> Plaintiff further alleges that he and his predecessors in title, immediate and remote, who were in privity with them for more than fifteen (15) years prior to the filing of this Petition, have been in actual, open, adverse, notorious, visible, exclusive and continuous possession of said real property, and each and every part thereof under claim of title and exclusive of every right, and Plaintiff has and asserts title to said property by prescription as well as by said valid conveyance above mentioned and referred to.

Pearce's Petition further claimed that Monica L. Sharum, among others, claimed an interest in the property, adverse to Pearce, and that such claims constituted a cloud on Pearce's title. The relief sought was for the Court to quiet Pearce's fee simple title in the above described tract as against the claims of Monica L. Sharum and others and to forever bar Monica L. Sharum, and the other Defendants, and all persons claiming through, by or under them, from ever asserting any interest in the property.

Service of summons was obtained upon Monica L. Sharum by publication. There was an Affidavit to obtain Service by Publication filed; an affidavit in Lieu of Mailing

Notice and Petition; and a Notice by Publication, as required by the Oklahoma statutes.

On December 4, 1978, Pearce obtained a Journal Entry of Judgment wherein the Court specifically stated that it had conducted a judicial inquiry into the sufficiency of the publication service; found that Pearce had exercised due diligence; and approved the publication service as meeting "both statutory requirements and the minimum standards of state and federal due process." It was further held that, after waiving trial by jury, and putting on evidence and the Court being fully advised, that judgment was granted in favor of Pearce quieting Pearce's title in the above described tract of land. In addition, there was a specific finding that Pearce, and his predecessors in title:

> [h]ave for more than fifteen (15) years been in actual, open, adverse, notorious, visible, exclusive and continuous possession of said described real property, and each and every part thereof under claim of title and exclusive of every other right and that Plaintiff has perfect title by prescription as well as by legal conveyances.

Furthermore, the Judgment quieted Pearce's title and barred Monica L. Sharum, and the other Defendants, and those claiming by, through or under them, from commencing any suit to disturb Pearce in his possession and title to the property. This Judgment was never appealed, set aside or vacated. See Appendix C to Petitioner's Petition, pp. 12a-17a.

Thereafter, Pearce gave an oil and gas lease to Respondents Pelizzoni and Lewis covering the above described tract of land. Pelizzoni and Lewis later assigned the oil and gas lease to P & L Energy Development, Inc., prior to any production being obtained.

On July 11, 1985, Petitioner McCabe filed a lawsuit, from which the instant action arose, collaterally attacking the 1978 judgment obtained by Pearce. Specifically, Petitioner's lawsuit alleged, among other things, that Pearce's 1978 judgment was founded on a County Treasurer's Certificate Tax Deed executed February 6, 1967,

and that the tax sale was irregular and void on its face since a purchaser under a Certificate Tax Deed cannot acquire title to the mineral estate without giving notice to the owner of the mineral estate. Petitioner alleged that there was no notice to the owner of the mineral estate and no adverse possession by Pearce. Petitioner alleged that the Court in the original quiet title action had no subject matter jurisdiction and that Petitioner had a valid defense to the quiet title action. Petitioner requested the Court to vacate the 1978 Journal Entry of Judgment which had quieted title to the property in Pearce.

Respondents Pelizzoni and Lewis filed a Motion for Summary Judgment and Respondents Board of County Commissioners and John F. Cantrell, County Treasurer, filed a Motion to Dismiss. On November 14, 1986, the Tulsa County District Court found:

> "That the Court in the Tulsa County District Court case of *Pearce v. Board of County Commissioners, et al,* Case #C-78-2116, had proper jurisdiction of the parties and the subject matter and the quiet title judgment in favor of Pearce rendered

therein is not void on the face of the judgment roll. The Court specifically finds that the subject property was sufficiently described therein." See Appendix B to Petitioner's Petition, pp. 8a-11a.

As a result, on November 14, 1986, the trial court sustained Respondents', Pelizzoni and Lewis, Motion for Summary Judgment. In addition, the court treated Respondents', Board of County Commissioners and John F. Cantrell, County Treasurer, Motion to Dismiss as a Motion for Summary Judgment, which it sustained. See Petitioner's Appendix B, pp. 8a-11a.

Thereafter, Petitioner McCabe perfected an appeal from the trial court's order in which she stated the following:

Exhibit C

ISSUES AND ERRORS PROPOSED TO BE RAISED ON APPEAL

PROPOSITION NO. I:

That the trial court erred as a matter of law in not finding the 1978 Quiet Title Judgment void on the face of the judgment roll as to Appellant. (Petitioner herein)

ISSUES: (1) Whether the petition in the 1978 Quiet Title Suit bestowed subject matter jurisdiction on the court concerning the severed mineral estate.

(2) Whether the court in the 1978 Quiet Title Suit acquired jurisdiction of the parties served only by publication notice on an inadequate affidavit and containing an incorrect legal description. Excerpt from Petition in Error filed in the Oklahoma Supreme Court on December 12, 1986.

On February 28, 1989, the Court of Appeals for the State of Oklahoma, Division III, affirmed the trial court's order holding that the Petitioner's action was a collateral attack on the 1978 judgment which had upheld the tax deed proceedings. Since, however, the appellate court found that the 1978 quiet-title judgment was not void on its face, the court could not reconsider any defects in the tax deed proceedings. See Appendix A to Petition for Certiorari, pp. 2a-7a.

On March 20, 1989, Petitioner filed a Petition for Rehearing with the Court of Appeals. On April 11, 1989, the Court of Appeals denied the Petition for Rehearing. See Appendix D to Petition for Certiorari, pp. 18a-19a.

Petitioner next asked the Oklahoma Supreme Court to issue a Writ of Certiorari to the Court of Appeals. On February 26, 1990, the Oklahoma Supreme Court denied certiorari. See Appendix F to Petition for Certiorari, pp. 22a-23a.

SUMMARY OF ARGUMENT

The Court should not grant a writ of certiorari to hear this case. The Oklahoma Court of Appeals applied long-standing Oklahoma law in refusing to allow Petitioner to collaterally attack the 1978 quiet-title judgment. Thus, the decision below rests on independent and adequate state grounds which deprives this Court of jurisdiction to review these issues by writ of certiorari. Furthermore, Petitioner never raised any federal issues below. Finally, Petitioner has never challenged any specific Oklahoma statute as being repugnant to the Constitution of the United States. Accordingly, this Court should dismiss the Petitioner's Petition for Writ of Certiorari.

REASONS FOR DENYING WRIT

I.

THIS COURT LACKS JURISDICTION BECAUSE THE COURT BELOW DECIDED THE ISSUES CORRECTLY ON INDEPENDENT STATE GROUNDS. FURTHER, THIS COURT SHOULD REFUSE TO GRANT CERTIORARI TO REVIEW A QUESTION OF STATE LAW THAT DOES NOT INVOLVE A SUBSTANTIAL FEDERAL QUESTION.

The Oklahoma Court of Appeals based its decision solely on independent state grounds. The court found that Petitioner's lawsuit was nothing more than a collateral attack on the 1978 quiet-title judgment. Since the 1978 quiet-title action conclusively dealt with any and all notice issues involved in the 1967 tax deed proceedings, the Oklahoma Court of Appeals held that those issues could not, under Oklahoma law, be relitigated in Petitioner's 1985 lawsuit.

Further, the court found that the allegations of the 1978 petition were sufficient, under Oklahoma law, to vest the

trial court with subject matter jurisdiction in the quiet-title action.

Finally, the Court of Appeals held that the description of the subject property was sufficient, and therefore, the 1978 judgment was not, under Oklahoma law, void.

It has long been the law that this Court will not review judgments of state courts that rest on adequate and independent state grounds. *Herb v. Pitcarin*, 324 U.S. 117, 65 S.Ct. 459, 89 L.Ed. 789 (1945). Justice White, acting individually, has pointed out that this Court's appellate jurisdiction over state courts extends only to final judgments with respect to issues of federal law. *New York Times v. Jascalevich*, 439 U.S. 1317, 1318, 99 S.Ct. 6, 58 L.Ed.2d 25 (1978). This case does not present a final state court decision on a federal question, and thus this Court is without jurisdiction.

II.

THIS COURT LACKS JURISDICTION TO REVIEW ON CERTIORARI FEDERAL QUESTIONS NOT PROPERLY PRESENTED OR DECIDED BELOW.

The statute authorizing review of state court decisions by means of a writ of certiorari states, in pertinent part, the following:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or *where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution,* treaties or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or commission held or authority exercised under, the United States." 28 U.S.C. §1257(a). (Emphasis added.)

Petitioner did not properly "set up or claim" the constitutional challenges that she now asserts. In order to have properly raised, and thus preserved for appeal, the federal question raised herein, Petitioner would have had to directly challenge the constitutionality of the Oklahoma

statutes governing vacation of judgments in the proceedings below. This simply was not done.

Even now Petitioner is not directly challenging the constitutionality of the Oklahoma statutes governing notice by publication nor the Oklahoma statutes governing vacation of judgments. Rather, Petitioner is still attempting to go behind the face of a valid Oklahoma court judgment and challenge the constitutionality of the tax deed proceeding underlying the 1978 quiet-title judgment. Petitioner has completely failed, however, to challenge, as unconstitutional, any specific Oklahoma statute. It is clear that the mere allegation of a federal question will not suffice to give this Court jurisdiction. *Equitable Life Assurance Society v. Brown*, 187 U.S. 308, 23 S.Ct. 123, 47 L.Ed. 190 (1902).

III.

THIS CASE PRESENTS NO QUESTION IMPORTANT ENOUGH TO JUSTIFY GRANTING CERTIORARI.

While this Court's Rule 10 is, by its own terms, not exclusive in setting out grounds for exercise of the Courts' discretionary jurisdiction, it does provide guidance as to the importance of the cases this Court seeks to consider. The present case confronts the Court with no split among the Circuits or between a Circuit and the highest court of any state. Nor does the Court need to exercise its supervisory powers herein. The Petitioner alleges no great dispute between the highest courts of any state on any substantial federal question. No federal question was decided by the courts below. The courts below have acted consistently with the decisions of this Court but found the facts contrary to Petitioner's position.

CONCLUSION

For the reasons stated herein, the Respondents, Board of County Commissioners of Tulsa County, and John F. Cantrell, County Treasurer, respectfully request this Court to deny Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

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